IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 6, 2007 Session

BODY INVEST, LLC ET AL. v. CONE SOLVENTS, INC.

A Direct Appeal from the Circuit Court for Davidson County
No. 05C-417 The Honorable Thomas Brothers, Judge

No. M2006-01723-COA-R3-CV - Filed on July 26, 2007

This case arises from the grant of summary judgment in favor of Defendant/Appellee. Plaintiffs/Appellants purchased denatured alcohol from Defendant/Appellee for use in Plaintiffs/Appellants' sunless, tanning products. Upon receipt of customer complaints, Plaintiffs/Appellants had the denatured alcohol tested, which testing revealed certain contaminates in the alcohol. Plaintiff/Appellants sued Defendant/Appellee under theories of negligence, breach of contract, breach of implied and express warranties, and misrepresentation. Finding that Plaintiffs/Appellants had not shown proof that Defendant/Appellee's product caused harm to the ultimate consumer, the trial court granted summary judgment in favor of Defendant/Appellee. Plaintiffs/Appellants appeal. We reverse and remand.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded

W. FRANK CRAWFORD, P.J., W.S., delivered the opinion of the court, in which ALAN E. HIGHERS, J. and DAVID R. FARMER, J., joined.

Raymond G. Prince of Nashville, Tennessee for Appellants, Body Invest, LLC and Norvell Skin Solutions, LLC

H. Frederick Humbracht, Jr. of Nashville, Tennessee for Appellee, Cone Solvents, Inc.

OPINION

Body Invest, L.L.C. ("Body Invest") and Norvell Skin Solutions, L.L.C. ("Norvell" and, together with Body Invest, "Plaintiffs," or "Appellants") are in the business of manufacturing sunless, tanning products. One of the components in their product is denatured alcohol. From September 2004 until January 2005, Body Invest and Norvell purchased SDA 40-2 denatured alcohol from Cone Solvents, Inc. ("Cone," "Defendant," or "Appellee"). Specifically, Cone shipped SDA 40-2 alcohol to Body Invest and Norvell on September 23, 2004, October 7, 2004, November 9,

2004, November 29, 2004, December 13, 2004, and January 4, 2005. These shipments were incorporated into Body Invest and Norvell's sunless, tanning product. Body Invest and Norvell allegedly received complaints from customers that people using the sunless, tanning products were experiencing symptoms including respiratory issues, and eye and skin irritation. Based upon these complaints, and also upon Body Invest and Norvell's own observations of an unusual smell akin to laquer thinner and/or petroleum in the alcohol, Body Invest and Norvell hired chemists, Janet Sullivan and Dennis Akin, to test the alcohol. The separate reports filed by Ms. Sullivan and Mr. Akin both indicate that the denatured alcohol contained an unacceptable level of contaminants. Thereafter, on February 11, 2005, Body Invest and Norvell filed their original Complaint in this case. The original Complaint alleges breach of contract, negligence, breach of implied warranties, and misrepresentation. On February 27, 2006, Body Invest and Norvell filed an "Amended Complaint," expanding upon the misrepresentation claim to include allegations of intentional misrepresentation, misrepresentation by concealment, and negligent misrepresentation. The Amended Complaint also states a cause of action for breach of express warranties and a claim for punitive damages.

A Scheduling Order, filed on September 30, 2005, required Body Invest and Norvell to disclose their Tenn. R. Civ. P. 26 experts and expert statements by December 30, 2005. Body Invest and Norvell complied with the scheduling order and produced the reports of both Ms. Sullivan and Mr. Akin. On February 28, 2006, Cone filed its "Motion for Summary Judgment," along with a statement of undisputed material fact, and memorandum of law in support thereof. In its Statement of Undisputed Material Facts, Cone specifically asserts that it is entitled to summary judgment based, *inter alia*, upon Body Invest and Norvell alleged failure to produce expert testimony sufficient to prove that Cone's denatured alcohol caused Body Invest and Norvell's damages, to wit:

> 9. Neither expert addressed the issue of causation; specifically, neither expert addressed whether Defendant's product caused the contamination of Plaintiffs' sunless tanning product (Reports by Akin and Sullivan).
>
> **RESPONSE:**
>
> 10. Neither expert identified the chemical purchased from Defendant [to] determine whether or not it was contaminated denatured alcohol (Reports by Akin and Sullivan).
>
> **RESPONSE:**

On March 13, 2006, Cone filed its Answer to the Amended Complaint, in which Answer Cone "admits it sold denatured alcohol to Norvell which it understood would be used in a cosmetic product," and "admits [that] plaintiffs inquired about an odor plaintiffs perceived from the alcohol." Cone states that "it tested the alcohol and advised plaintiffs that there was nothing wrong with the alcohol." Cone specifically denies all other material allegations contained in the Amended

Complaint. On May 4, 2006, Body Invest and Norvell filed their Response to Cone's Motion for Summary Judgment, along with their response to the statement of material facts, which response reads, in pertinent part, as follows:

> 9. Neither expert addressed the issue of causation; specifically, neither expert addressed whether Defendant's product caused the contamination of Plaintiffs' sunless tanning product (Reports by Akin and Sullivan).
>
> **RESPONSE:** This fact is disputed. The Akin report contained a Material Safety Data Sheet which detailed the health hazards attendant to one of the chemical found, Butoxyethoxyethyl Acete.
>
> 10. Neither expert identified the chemical purchased from Defendant [to] determine whether or not it was contaminated denatured alcohol (Reports by Akin and Sullivan).
>
> **RESPONSE:** This fact is disputed. The Akin report has under the purpose of the examination the word "Contamination Determination." The second page of the report mentions eight separate components found, none of which are included in the proper ingredients in SDA40-2 Denatured Alcohol, as specified in the Sasol Solvents MSDS. In addition, the Akin report found that such contaminants, which are petroleum distillates, comprise four percent of the total of the alcohol.
>
> In addition, the Sullivan report found two specific contaminants and a number of other unnamed contaminants, specified that the alcohol had an oily smell, and specified that the alcohol was yellow in color.

Body Invest and Norvell also filed a statement of additional, material facts. On May 10, 2006, Cone filed a response to Body Invest and Norvell's statement of additional facts, which Response reads, in relevant part, as follows:

> 3. The chemical composition of the SDA 40-2 denatured alcohol in question as specified by the Alcohol and Tobacco Tax and Trade Bureau, United State[s] Department of Treasury, and as intended by the parties to have been sold by Defendant to Plaintiffs, is 99.9 percent Ethyl Alcohol, .01 percent T-Butyl Alcohol, and 0.001 percent Brucine Sulfate....

RESPONSE: Denied.

First of all, the formulation of SDA 40-2 calls for 0.1% T-Butyl Alcohol, not 0.01%. In addition, as plaintiffs' own experts have testified, the formulation of SDA 40-2 is a range, a target. As plaintiffs' experts have testified, variations in the percentage of each ingredient is not only expected, but accepted in the industry. In fact, the Certificate of Analysis cited by plaintiffs as Attachment 5 clearly indicates the SDA 40-2 was comprised of 99.88% Ethanol 200 Proof and 0.12% Tert Butyl Alcohol and makes no reference to Brucine Sulfate.

4. Plaintiffs received complaints of customers having respiratory and eye irritation from use of Norvell Sunless Skin Solution....

RESPONSE: Defendant admits plaintiffs have made the claim of receiving complaints from customers, but there is absolutely no proof in the record of these complaints. Therefore, defendant denies this statement of fact. Defendant admits Mr. Norvell claimed he received such complaints in his deposition.

* * *

7. Because of the customer complaints, the presence of contaminants in the alcohol and, therefore, in the Norvell Sunless Skin Solution, and the similar[ity] of the complaints voiced by the customers to the expected adverse effects of the contaminants found in the alcohol, plaintiffs ceased shipping any further sunless skin solution, bought replacement alcohol, and began replacing the skin solution....

RESPONSE: Defendant admits Mr. Norvell has made the claim set out above, but defendant denies there is any proof in the record to support same.

Therefore, defendant denies this statement of fact.

In addition, Mr. Norvell has testified not all of the allegedly contaminated sunless skin solution was in fact recalled or replaced.

8. The SDA 40-2 denatured alcohol sold by defendant to plaintiffs, and the Norvell Sunless Skin Solution at issue which contained it, were contaminated because of the following compounds, none are

part of the proper formula as stated in number 3 herein, were found in them: Mixed xylenes; Propyl Benzene; Methyl and Methyl-ethyl substituted benzenes; Indanes; assorted various Tetra-Methyl, diethyl and Methyl-Methyl-Ethyl Benzenes; Naphthalene; assorted various Penta-Methyl and other 5-methyl or methyl-ethyl combination benzenes; and Butoxyethoxyethyl Acetate....

RESPONSE: Denied.

There is no proof the Norvell Sunless Skin Solution at issue was in fact contaminated. Plaintiffs' experts have not quantified the level, amount or percentage of the alleged contaminants found in the alcohol or the sunless skin solution. There is no proof in the record any of these alleged contaminants could cause any of the symptoms for which the plaintiffs complain or, they were of a sufficient amount in the finished product to have caused any of the symptoms of which the plaintiffs complain.

Therefore, defendant denies this statement of fact.

(Citations omitted).

Cone's Motion for Summary Judgment was heard on May 11, 2006. On May 25, 2006, the trial court entered its "Order Granting Summary Judgment," which Order reads, in relevant part, as follows:

The Court, having considered the motion for summary judgment, the affidavits, and other discovery materials submitted in support thereof and in opposition thereto and argument of counsel, is of the opinion that there is no material issue of fact in dispute as to causation and that Defendant is entitled to a judgment dismissing this action against it.

Plaintiffs manufacture a sunless tanning product. Plaintiffs purchased from Cone Solvents denatured alcohol, described as SDA 40-2, that it incorporated into their finished product. Plaintiffs allege that the SDA 40-2 it purchased from Cone Solvents was contaminated and contained substances not identified in the Material Safety Data Sheet. Plaintiffs allege that it received customer complaints of respiratory, eye and skin irritation and withdrew its sunless tanning products from the market. Plaintiffs produced reports

> of expert witnesses who identified additional substances within the SDA 40-2 not identified on the MSDS, but neither of those witnesses stated that the additional substances in the SDA 40-2 caused Plaintiffs' sunless tanning product to be defective or caused respiratory, eye or skin irritation. Indeed, the MSDS for the SDA 40-2 product supplied specifically warns that "Prolonged exposure to excessive concentrations of ethanol may result in irritation of mucous membranes, headache, drowsiness, fatigue and narcosis." It further warns that "High vapor concentrations may cause upper respiratory tract irritation and narcosis" and states that "Liquid or vapor may cause irritation" to the eyes.
>
> Defendant's motion asserted that the additional elements found in the SDA 40-2 did not cause it to be contaminated or not fit for use as SDA 40-2, but at oral argument conceded that a disputed issue of fact exists as to that point. However, the motion asserted that even assuming the SDA-40 was contaminated, Plaintiffs failed to establish that the contaminates caused the problems about which Plaintiffs' customers complained and that expert testimony is necessary to establish this since these matters are beyond the knowledge of lay persons.
>
> The Court agrees. It finds that expert testimony is necessary to conclude that the additional elements within the SD 40-2 make Plaintiffs' product unsafe or not an effective product or makes the product defective. The record is devoid of any evidence that says any of these substances more likely than not caused the complaints by Plaintiffs' customers that led Plaintiffs to withdraw the product from the market. Absent some proof as to causation, Plaintiffs' claims cannot succeed.

On June 1, 2006, Body Invest and Norvell filed a Motion to Alter or Amend, which Motion was denied by the trial court's Order of August 4, 2006. Body Invest and Norvell appeal and raise three issues for review as stated in their brief:

> 1. Whether the trial court erred in granting Defendant's Motion for Summary Judgment by basing its decision upon grounds not contained therein;
>
> 2. Whether the trial court erred in granting Defendant's Motion for Summary Judgment by basing its decision upon an immaterial issue–that is, whether or not the conceded contaminant in the alcohol

> caused the problems about which the ultimate users of Plaintiffs' products complained;
>
> 3. Whether the trial court erred in determining that there was no proof showing the unsuitability of Defendant's product.

It is well settled that a motion for summary judgment should be granted when the movant demonstrates that there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law. ***See*** Tenn. R. Civ. P. 56.04. The party moving for summary judgment bears the burden of demonstrating that no genuine issue of material fact exists. ***See Bain v. Wells***, 936 S.W.2d 618, 622 (Tenn.1997). On a motion for summary judgment, the court must take the strongest legitimate view of evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence. ***See id.*** In ***Byrd v. Hall***, 847 S.W.2d 208 (Tenn.1993), our Supreme Court stated:

> Once it is shown by the moving party that there is no genuine issue of material fact, the nonmoving party must then demonstrate, by affidavits or discovery material, that there is a genuine, material fact dispute to warrant a trial. In this regard, Rule 56.05 provides that the nonmoving party cannot simply rely upon his pleadings but must set forth specific facts showing that there is a genuine issue of material fact for trial.

Id. at 211 (citations omitted).

Summary judgment is only appropriate when the facts and the legal conclusions drawn from the facts reasonably permit only one conclusion. ***See Carvell v. Bottoms***, 900 S.W.2d 23, 26 (Tenn. 1995). Because only questions of law are involved, there is no presumption of correctness regarding a trail court's grant or denial of summary judgment. ***See Bain***, 926 S.W.2d at 622. Therefore, our review of the trial court's grant of summary judgment is *de novo* on the record before this Court. ***See Warren v. Estate of Kirk***, 954 S.W.2d 722, 723 (Tenn.1997).

As set out above, Body Invest and Norvell allege breach of contract, negligence, breach of implied and express warranties, intentional and negligent misrepresentation, and concealment. We will address each of the causes of action in turn to determine whether summary judgment was properly granted as to each.

Intentional and Negligent Misrepresentation

In ***Robinson v. Omer***, 952 S.W.2d 423 (Tenn.1997), our Supreme Court discussed the essential elements of a negligent misrepresentation claim:

> Tennessee has adopted Section 552 of the Restatement (Second) of Torts "as the guiding principle in negligent misrepresentation actions against other professionals and business persons." ***Bethlehem Steel Corp. v. Ernst & Whinney***, 822 S.W.2d 592, 595 (Tenn.1991). Section 552 provides, in pertinent part, as follows:
>
> > (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, *supplies false information for the guidance of others in their business transactions, is subject* to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
> >
> > (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
> > (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
> >
> > (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction. Restatement (Second) of Torts, § 552 (1977) (emphasis added).

Robinson v. Omer, 952 S.W.2d at 427 (emphasis in original).

In discussing the requirements for recovery under Section 552, this Court has stated that liability in tort will result, despite the lack of contractual privity between the plaintiff and defendant, when:

> (1) the defendant is acting in the course of his business, profession, or employment, or in a transaction in which he has a pecuniary (as opposed to gratuitous) interest; and
>
> (2) the defendant supplies faulty information meant to guide others in their business transactions; and

(3) the defendant fails to exercise reasonable care in obtaining or communicating the information; and

(4) the plaintiff justifiably relies upon the information.

John Martin Co. v. Morse/Diesel, Inc., 819 S.W.2d 428, 431 (Tenn.1991); *accord* ***Ritter v. Custom Chemicides, Inc.***, 912 S .W.2d 128, 130 (Tenn.1995); ***Robinson v. Omer***, 952 S.W.2d at 427.

In addition to the four *prima facie* requirements for negligent misrepresentation, intentional misrepresentation requires a fifth element, which is that "the false representation [must be made] either knowingly or without belief in its truth or recklessly [with regard to its truth]." ***Metropolitan Gov't v. McKinney***, 852 S.W.2d 233, 237 (Tenn.Ct . App.1992); ***see also*** Restatement (Second) of Torts § 525 (1977). "[A] person acts fraudulently when (1) the person intentionally misrepresents an existing, material fact or produces a false impression, in order to mislead another or to obtain an undue advantage, and (2) another is injured because of reasonable reliance upon that representation." ***Hodges v. S.C. Toof & Co.***, 833 S.W.2d 896, 901 (Tenn., 1992). For either a finding of intentional misrepresentation or negligent misrepresentation, a plaintiff must produce evidence that his or her reliance upon the misrepresentation(s) was justified.

Similarly, misrepresentation by concealment requires a plaintiff to prove the following elements: (1) the defendant concealed or misrepresentated a material fact; (2) the defendant was under a duty to disclose the fact to the plaintiff; (3) the defendant intentionally concealed or suppressed the fact with the intent to deceive the plaintiff; (4) the plaintiff was not aware of the fact and would have acted differently if the plaintiff knew of the concealed or suppressed fact; and, (5) as a result of the concealment or suppression of the fact, the plaintiff sustained damage. T.P.I. 3-CIVIL 8.38; ***Lonning v. Jim Walter Homes, Inc.***, 725 S.W.2d 682, 685 (Tenn.Ct.App.1986).

Breach of Implied and Express Warranties

Novell and Body Invest also assert causes of action for breach of express warranties under T.C.A. § 47-2-313, breach of implied warranty of merchantability under T.C.A. § 47-2-314, breach of implied warranty for fitness for a particular purpose under T.C.A. § 47-2-315.

Express Warranties

T.C.A. § 47-2-313 (2001) outlines express warranties by affirmation, promise, description, or sample and reads as follows:

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the

> bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
>
> (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
>
> (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

Id.

In order to establish a *prima facie* claim for breach of express warranty, a plaintiff must prove that: (1) Seller made an affirmation of fact intending to induce the buyer to purchase the goods; (2) Buyer was in fact induced by the seller's acts; and (3) The affirmation of fact was false regardless of the seller's knowledge of the falsity or intention to create a warranty. T.C.A. § 47-2-302 (Supp. 2006), note 7 (citing ***Coffey v. Dowley Mfg., Inc.***, 187 F. Supp. 2d 958, 2002 U.S. Dist. LEXIS 6898 (M.D. Tenn. 2002), aff'd, 89 Fed. Appx. 927, 2003 U.S. App. LEXIS 26610 (2003)).

Implied Warranties

T.C.A. § 47-2-314 (2001) outlines the implied warranty of merchantability and reads as follows:

> 1) Unless excluded or modified (§ 47-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
>
> (2) Goods to be merchantable must be at least such as:
> (a) pass without objection in the trade under the contract description; and
> (b) in the case of fungible goods, are of fair average quality within the description; and

> (c) are fit for the ordinary purposes for which such goods are used; and
> (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
> (e) are adequately contained, packaged, and labeled as the agreement may require; and
> (f) conform to the promises or affirmations of fact made on the container or label if any.
>
> (3) Unless excluded or modified (§ 47-2-316) other implied warranties may arise from course of dealing or usage of trade.

Id.

T.C.A. § 47-2-315 (2001) outlines the implied warranty for fitness for a particular purpose and reads, in pertinent part, as follows:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose....

Id.

In ***Browder v. Pettigrew***, 541 S.W.2d 402 (Tenn.1976), the Supreme Court addressed the concept of "fit[ness] for the ordinary purposes for which such goods are used":

> A product is defective if it is not fit for the ordinary purposes for which such articles are sold and used ... [citations omitted]. Establishing this element requires only proof, in a general sense and as understood by a layman, that 'something was wrong' with the product. As a rule the mere occurrence of an accident is not sufficient to establish that the product was not fit for ordinary purposes. However, additional circumstantial evidence, such as proof of proper use, handling or operation of the product and the nature of the malfunction, may be enough to satisfy the requirement that something was wrong with it....

Id. at 406 (quoting ***Scanlon v. General Motors Corp.***, 65 N.J. 582, 326 A.2d 673 (1974)).

Negligence

In a products liability action in which recovery is sought under the theory of negligence, the plaintiff must establish the existence of a defect in the product just as he does in an action where recovery is sought...for breach of warranty, either express or implied. ***Browder v. Pettigrew***, 541 S.W.2d at 404 (citing ***Hasson v. Ford Motor Company***, 51 Cal.App.3d 104, 123 Cal.Rptr. 798 (1975); *Cf.* ***MacPherson v. Buick Motor Company***, 217 N.Y. 382, 111 N.E. 1050 (1916)). The only significant difference is that under the negligence theory the plaintiff has the additional burden of proving that the defective condition of the product was the result of negligence in the manufacturing process or that the manufacturer or seller knew or should have known of the defective condition. ***Id.*** (citations omitted). While proof of a malfunction alone should be sufficient under the...warranty theories in a products liability case, a higher standard of specificity of proof of defect is required in order to recover under the negligence theory. Noting that the primary focus in a negligence action is defendant's conduct and duty of due care, the ***Browder*** Court concluded that "(i)t is vital to trace the injury to some Specific error in construction or design ... to determine whether the defect could have been avoided by exercise of reasonable care." ***Id.*** (quoting ***Greco v. Bucciconi Eng. Co.***, 283 F.Supp. 978 (W.D.Pa.1967), affirmed, 407 F.2d 87 (3d Cir. 1969)).

Based upon the foregoing, the gravamen of all of the Plaintiffs' theories is whether the denatured alcohol they received is, in fact, the product for which they bargained. This question is very much disputed in the record–Norvell and Body Invest assert (and support through the reports of their experts) that the SDA 40-2 denatured alcohol they purchased from Cone was not an acceptably pure product according to industry standards. The dispute of fact concerning this threshold issue was conceded by the parties to this suit at the hearing on the Motion for Summary Judgment, to wit:

> THE COURT: Well, I think that you all are conceding that there is at least a question of fact as to whether or not the denatured alcohol provided to Body Invest met the CFR specifications?
>
> MR. HUMBRACHT [Attorney for Cone]: Yes.

Based upon the dispute of fact concerning whether the SDA 40-2 sold by Cone met CFR specifications, we conclude that the trial court erred in granting summary judgment in favor of Cone on all of Body Invest and Norvell's causes of action. As set out above, under the theory of express warranty, Body Invest and Norvell must show that the product was not as warranted. Under theories of implied warranty, Body Invest and Norvell must show that the alcohol was not merchantable or fit for the particular purpose for which it was sold. Under theories of misrepresentation, Body Invest and Norvell must show that Cone negligently, or intentionally, provided false information. Under breach of contract, Body Invest and Norvell must show that the product sold was not the product for which they bargained. And, under negligence, Body Invest and Norvell must show that Cone negligently provided a faulty product. Although causation and damages are part and parcel of some of these claims, these elements do not require proof that the ultimate consumers were harmed. Rather, causation and damages in this case arise from Norvell and Body Invest's allegedly being forced to remove the products containing the allegedly contaminated SDA 40-2 from the market and

the costs, both monetary and otherwise, associated with that recall. However, under the theories alleged, it is not part of Body Invest and Norvell's burden to shown that the ultimate consumers were harmed by the SDA 40-2. They must only show that they were harmed. From our review of the record, and particularly in light of the disputed fact as to whether the SDA 40-2 bought from Cone was, in fact, contaminated, Body Invest and Norvell have put forth sufficient evidence to survive summary judgment on all causes of action set out in the Amended Complaint.

For the foregoing reasons, we reverse the Order of the trial court granting summary judgment to Cone, and remand the case for such further proceedings as may be necessary. Cost of the appeal are assessed against the Appellee, Cone Solvents, Inc.

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W. FRANK CRAWFORD, PRESIDING JUDGE, W.S.